Editor's note: Appealed -- aff'd, Civ.No. 72-92-TUC-JAW (D.Ariz. Sept. 11, 1973)

UNITED STATES
v.
GUNSIGHT MINING COMPANY

IBLA 70-380 Decided March 1, 1972

Appeal from a decision by Robert W. Mesch, Departmental hearing examiner (Arizona Contest 6-3597 (Papago I. R.)), holding lode mining claims null and void.

Affirmed.

Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Withdrawn Land

Where the land occupied by mining claims is subsequently withdrawn from all forms of exploration, location and entry under the mining laws, evidence obtained thereafter by drilling, sampling and other exploratory activities cannot be considered for any purpose other than the extent to which such geological investigations may tend to support an assertion that valuable deposits of minerals had been physically disclosed within the boundaries of each of the claims prior to that date, i.e., the qualifying discovery must have been made prior to the date of the withdrawal.

Mining Claims: Discovery: Generally

Where the mineral of primary interest (fluorite) cannot be mined profitably alone or in association with other locatable minerals, although the presence of such minerals is indicated, a qualifying discovery of a valuable mineral deposit has not been effected.

Mining Claims: Discovery: Generally

The finding of a mineralized area on which the hope for the development of a valuable mine relies to a disproportionate degree on the chance of encountering ore bodies as yet unknown cannot be regarded as an endeavor in which a prudent man would be justified in investing with a reasonable expectation of

success in the development of a paying mine, and therefore it cannot qualify as a discovery of a valuable mineral deposit within the meaning of the mining law, even though a prudent man might be justified in spending his labor and means in further prospecting.

Mining Claims: Discovery: Geologic Inference

Geologic inference may be relied upon to establish the extent and potential value of a particular deposit, but it may not be relied upon as a substitute for the actual exposure of a mineral deposit, and where a vein carrying some erratic mineral values has been exposed but does not disclose a mineral deposit capable of development, and where the existence of such a deposit can only be inferred, a discovery has not been shown.

APPEARANCES: Hale C. Tognoni, William N. Hackenbracht for appellant.

OPINION BY MR. STUEBING

The Gunsight Mining Corporation has appealed from the hearing examiner's decision of September 5, 1969, by which 20 unpatented mining claims were declared null and void. 1/

The various claims were located in 1921, 1922 and 1925 in what has been called the Gunsight Mine Area. Prior to his death in 1926 C. B. Sheehan, a mining engineer and the husband of the principal locator, acquired control of the Gunsight Mine itself, a patented mine that had produced during the 1870's and the early 1880's. 2/ The Sheehan family kept their interest in the claims through the

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1/ The contest involves the Cashier, Assistant Cashier, Assistant Cashier Extension, East Cashier Extension, Galena Nos. 1-6, South Cashier, South Cashier Extension, North Cashier, Surprise, Surprise Nos. 2-5, Surprise No. 7, and Richlieu load mining claims situated in T. 14 S. and T. 15 S., R. 4 W., G. & S.R. Meridian, Pima County, Arizona. This appeal concerns only 19 of the claims, the Contestee acknowledging that the situs of the Richlieu lode claim cannot be ascertained.

2/ The date of C. B. Sheehan's death according to the testimony of his son, Lawrence J. Sheehan, was May 6, 1926 (Tr. 732). However, Exh. E, a report by witness Harry E. Nelson, states that Cornelius Benjamin Sheehan was born in Dublin, Ireland in 1881, moved to Butte, Montana, in 1884, married in 1917, acquired the Gunsight Mine in 1921, and died in 1922, at the age of 41. (pp. 7, 8) This account raises questions concerning his alleged participation in the location of the subject claims by his wife.

years and allegedly performed annual assessment work, although no affidavits of annual labor were filed between 1926 and 1962. In 1962 the Sheehan Mining Corporation was formed, by which several thousands of dollars were made available for geologic engineering and legal work. In 1963, the Gunsight Mining Corporation was organized, which absorbed the Sheehan Mining Corporation and undertook geological investigation of all of the claims held by the corporation, both patented and unpatented, with the exception of the Richlieu claim. In December 1967 the properties were leased to CF&I Steel Corporation with a purchase option incorporated in the agreement. CF&I Steel Corporation engaged in its own drilling and exploration program which was ongoing at the time of the contest hearing. There has never been mineral production from any of the contested claims.

Of critical significance in this case is the fact that the claims in question are located in Pima County, Arizona, on the Papago Indian Reservation. These lands were closed to all forms of exploration, location, and entry under the mining laws by the Act of May 27, 1955, 69 Stat. 68, except for any claim "that has been validly initiated before the date of this Act and thereafter maintained under the mining laws of the United States."

The language quoted from the statute raises the question of whether the claims at issue were "thereafter maintained under the mining laws of the United States." See Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). We will forego consideration of that aspect of the matter in view of the fact that the issue cannot be said to arise from allegations of the complaint. However, it is indisputable that the statute requires that the claims be valid as of the date of the Act in order to subsist beyond that date. Accordingly, we cannot consider the drilling, sampling and other activities pursued on the claims after May 27, 1955, for any purpose other than the extent to which such geological investigations may tend to support an assertion that valuable deposits of minerals had been physically disclosed within the boundaries of each of the claims prior to that date.

As pointed out in the examiner's decision, if a mining claim is not supported by a discovery at the time of withdrawal (even though there may have been a valid discovery at some prior time), the claim would not then be a valid existing mining claim and the land so occupied would not be excepted from the force and effect of a withdrawal. Gwillim v. Donnellan, 115 U.S. 45 (1885); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); Mulkern v. Hammitt, 326 F.2d 896

(9th Cir. 1964); United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (1959); United States v. Wingfield, A-30642 (February 17, 1967); United States v. William D. Pulliam et al., 1 IBLA 143 (1970).

The salient issue, then, is whether or not a discovery of a valuable deposit of mineral had been made and preserved on each, or any, of the contested claims as of May 27, 1955.

The prima facie case of invalidity was made by the contestant by the introduction of exhibit evidence and the testimony of three expert witnesses, Robert A. McColly, Henry O. Ash and Hall F. Susie, each of whom is a qualified geologist or mining engineer.

McColly examined the area of the claims in December 1961 and January 1962 and found no evidence of any recent mining or prospecting activity. The claims were not then generally accessible by vehicle. He reexamined the claims in 1962, 1964, 1966, 1968 and 1969. He took samples and studied the geology and reports, maps and other literature relating to the claims and their vicinity and mining and smelting costs.

Ash examined the claims on four occasions between 1962 and 1969. He worked with McColly in taking samples and analyzing the assays and other data. Susie visited the claims and made a visual inspection of a number of cuts that had been opened. He also reviewed the data that had been compiled by McColly and Ash and that which had been supplied by the contestee.

Each of these witnesses acknowledged, in effect, that the area is mineralized and that evidence indicates the presence of a variety of minerals, including gold, silver, lead, copper, zinc, molybdenum, barite and fluorite. Each testified to the effect that his studies of the claims indicated that the area would make an interesting prospect, but they were unanimous in their opinions that they observed no discovery of a mineral deposit of sufficient value to warrant a prudent person to expend his labor and means with a reasonable expectation of developing a valuable mine, either at present or in May 1955.

The contestee adduced exhibit evidence and testimony by Harry E. Nelson and James Brooks, both well qualified as experts.

Brooks, district geologist for CF&I Steel Corporation, visited the property in November 1964, in March 1965 and in November 1967,

when he was accompanied by his company's chief geologist, a Mr. Carter. As the result of his observations and analyses of samples taken during these visits, and a study of several geological reports concerning the area, CF&I Steel negotiated the lease and option agreement previously mentioned. The company's interest was focused chiefly on a structure identified as the Surprise Vein, which Brooks indicated crosses several of the Surprise and Cashier claims. He also indicated his interest in several other areas of the claims where mineralization was present in a geologic condition which he regarded as significant.

The company's primary interest is in the fluorite, which Brooks found on 17 of the 19 claims he examined. CF&I Steel is a consumer of fluorite. However, Brooks testified that the claims could not be mined for fluorite alone because they could not compete economically with imported fluorite. Other minerals mined in association with the fluorite would have to yield sufficient profit to close this economic gap. On cross examination Brooks defined "ore" as a material that can be mined and sold at a profit, and stated that on the basis of that definition he didn't know if there is ore on these claims, but he added that he was not responsible for making that kind of judgment for his company and that it may still be looking for or may have found it. He stated that in his opinion the claims offered "a reasonable hope."

In response to examination by the hearing examiner Brooks elaborated on his testimony, stating that "ore" depends not only upon the value of the rock but upon its depth, the quantity available within the deposit, and the cost of separating the minerals. He further stated that while he has found material that would normally be of ore grade if there were sufficient quantities of it, there had not been time to find sufficient quantities as yet. In the first two drill holes sunk by CF&I Steel they did not find ore. The third hole was being drilled while the hearing was in progress (in January 1969), and he did not know if ore had been encountered in that hole.

Harry Eugene Nelson, a registered consulting geological engineer, testified that his examination of the claims in the spring of 1963 and the winter of 1964 occupied 54 days, during which he estimated roughly that he walked 400 miles. This examination was accomplished by Nelson for a private client, a Mr. Woodard. A portion of these examinations was devoted to the patented lands and to claims not involved in this contest. He readily acknowledged that his opinion of the validity of the unpatented claims was influenced by his findings on the other lands adjacent and nearby, and that his opinion and recommendations related to the whole area. He testified that he was particularly impressed with the fluorite, stating that he had never seen fluorite

spread over such a large area. He said that along with the fluorite there was barite, some galena and a little silver, some of "pretty high grade." On the basis of his findings he testified that he recommended acquisition of the property to his client, Woodard, on the ground that Woodard would have a reasonable expectation of making money on it. Woodard, he stated, negotiated with the owners of the patented and unpatented claims without success. However, Nelson's testimony agreed with Brooks' in recognizing the need to produce and recover associated minerals of sufficient value to bolster the anticipated economic yield from the production of fluorite. He said that the recovery of copper, silver, lead, "and all the rest of those things that you can get" would have to be determined by testing. In this regard he stated ". . . that maybe the potential of silver minerals, some at depth at that area out in there . . . where CF&I is drilling . . . is the real good target." Without such information he declined to estimate what the fluorite values within the claims would have to be in order to consider the fluorite economically mineable. He also declined comment on the silica content of the fluorite, a factor which has direct bearing on the recoverable fluorite values, saying that milling tests should be run.

More than 400 samples were taken in the area by Nelson, in addition to those taken by Brooks, Ash, McColly and others (although only 87 of Nelson's samples actually were taken from the contested claims). The assay reports of these samples show that a very few indicate high values for various minerals. But these few isolated high returns stand in marked contrast to the hundreds of assays showing low values which could only be regarded as submarginal by even the most optimistic realist. Moreover, no evidence suggests that even the points where the few high value samples were taken were the sites of any alleged discovery predating May 27, 1955. After the death of C. B. Sheehan in 1926 there apparently was no serious exploratory effort conducted on the contested claims until about 1962. As previously noted, a discovery effected after May 27, 1955, could not serve to validate these claims.

It is apparent that both Brooks and Nelson pin their hopes for the success of a fluorite mining venture on their anticipation that substantial values in associated metallic minerals can be mined at the same time. Both anticipate that silver would play an important role in making the fluorite operation an economically viable enterprise, theorizing that greater amounts of silver than have yet been found may have been leached away and redeposited at depth through oxidation and ground water action. The weakness in the contestee's case lies in the failure to demonstrate that there was actually found any deposits of any mineral or combination of minerals which

would serve to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Without such a discovery the requirements of the statute (30 U.S.C. § 22 et seq.) have not been met. Castle v. Womble 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1919); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Coleman, 390 U.S. 599 (1968).

The record shows that the recognized standards of discovery were applied in this case. Mere evidence of mineralization that might warrant further exploration or engender hope of future profit does not demonstrate a discovery. Although appellant contends that what has been found on the claims would justify further work to establish the validity of the claims, such evidence of mineralization coupled with the hope or belief that minerals of greater value may subsequently be discovered and mined economically does not validate the claims. United States v. Elsie Cody, 1 IBLA 92 (1970); see Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied 393 U.S. 1025 (1969); United States v. Henault Mining Company, 73 I.D. 184 (1966), aff'd in Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied 398 U.S. 950 (1970).

There can be little doubt that the contested claims represent an interesting prospect. All of the expert testimony so indicates. The assay reports show the presence of a variety of minerals, albeit the values are generally low, and the overall geology is such as to encourage further exploration. That, in fact, had been undertaken several years previously and was in progress at the time of the hearing. However, CF&I Steel Corporation was not conducting the drilling program for the purpose of blocking out or defining a known ore body; it was seeking to find ore. Most of the data presented was obtained in the course of these various recent explorations. Disregarding, for a moment, the untimeliness of these exploratory efforts, the most that may be said of all of the data gathered and presented is that there is a geologic inference that greater values may exist on some or all of the claims in question. Geologic inference may be relied upon to establish the extent and potential value of a particular mineral deposit, but it may not be relied upon as a substitute for the actual exposure of a mineral deposit to establish the existence of the deposit. This is not to suggest that the total perimeters of the ore body must be delineated. Where a vein carrying some erratic values in mineralization has been exposed within the limits of a mining claim but the exposed mineralization does not constitute a mineral deposit capable

of development, and where the existence of such a deposit within the limits of the claim can only be inferred, a discovery, within the meaning of the mining laws, has not been shown and the claim is properly declared invalid. United States v. Watkins, A-30659 (October 19, 1967).

To validate a mining claim, the claimant must actually expose a valuable mineral deposit physically within the claim. Henault Mining Company v. Tysk, supra; United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971).

While the Department requires no showing of commercial ore sufficient to assure the economic success of a mining venture, there must be a physical disclosure of a mineral deposit of sufficient value to indicate that it would be reasonable to expect that an economic success would result from the development of a mine. Otherwise the venture would constitute rank speculation, a pure gamble. Risk taking is inherent in mining, as in many other areas of investment, and many are willing to take long chances in hope of large returns. The United States has said, however, through its decisions over the course of nearly 100 years, that it will not grant patents to its public lands merely because a mining claimant has found enough evidence of mineralization to stimulate his desire to take a blind risk in the unjustified hope that fate will be kind. A risk which relies upon chance to a disproportionate degree cannot be regarded as an endeavor in which a prudent man would be justified in investing with a reasonable expectation of success.

Legend has it that banks have loaned large sums to the holders of strong poker hands, based upon the calculated and reasonable probability that such hands will prevail. By contrast, no prudent investor would be likely to enter an economic partnership with the holder of a pair of deuces with a reasonable expectation that the luck of the draw would convert that meager showing into a winning hand, although it is entirely conceivable that that might occur. The money spent by prudent and reasonable men to conduct exploration activities cannot be referred to as proof of the prudence and reasonableness of an effort to develop a mine thereafter. That money may be likened to the ante and first bet or call in a poker game. It is money spent in an effort to gain the essential information on which to formulate an informed judgment as to whether additional investment is more likely to yield a profit or be lost. The development of a mine on any or all of the contested claims in the hope that the excavations might encounter commercially valuable ore bodies, as yet unknown, and thereby justify the risk, would be the act of a gambler and not that of a reasonable, prudent man.

It is our conclusion that no demonstrable discovery was made on any of the contested claims prior to May 27, 1955, or at any subsequent time prior to the hearing of the contest.

Appellant has requested permission to present oral argument in this matter. The evidence of record affords a sufficient basis upon which to rest our conclusion. Oral argument would serve no useful purpose. Accordingly, the motion is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed.

Edward W. Stuebing, Member

We concur:

Frederick Fishman, Member

Newton Frishberg, Chairman